Meaden Screw Products Co. *and* Brian Freid. Case 13–CA–34483(E)

September 28, 2001

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On November 10, 1998, Administrative Law Judge William G. Kocol issued the attached supplemental decision.[1] The General Counsel filed exceptions and supporting brief, and the Applicant filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

A. Background

On August 1, 1997, the judge issued his decision in the underlying unfair labor practice case involving the Applicant. On May 15, 1998,[2] the Board adopted the judge's 1997 decision and dismissed the complaint in its entirety.[3] On June 2, the Applicant filed an application for an award of attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and Section 102.143 of the Board's Rules and Regulations. The application alleged, inter alia, that the General Counsel was not substantially justified in pursuing the unfair labor practice case against the Applicant. On June 30, the General Counsel submitted a motion to dismiss the application and an alternative motion to strike certain portions of the application. In his motion to dismiss, the General Counsel claimed, inter alia, that his prosecution of the underlying unfair labor practice case was substantially justified throughout all phases of the case.

In his Order dated September 8, the judge granted in part and denied in part the General Counsel's motions. The judge found substantial justification for the General Counsel to have issued and prosecuted the unfair labor practice complaint against the Applicant, but he found no substantial justification for either the General Counsel's predecisional settlement posture in the underlying case or the General Counsel's filing of exceptions to the judge's 1997 decision.

On October 8, the General Counsel filed an answer, with attached exhibits, seeking a denial of the Applicant's EAJA application. Paragraph V of the answer denies corresponding paragraph 5 of the application alleging that the General Counsel's position throughout the unfair labor practice case was not substantially justified. The answer also includes two affirmative defenses asserting substantial justification for the General Counsel's settlement posture in the underlying unfair labor practice case and the General Counsel's filing of exceptions to the judge's 1997 decision. The Applicant filed a reply to the answer.

In his supplemental decision dated November 10, the judge struck "those portions of the answer that seek to relitigate the issue of substantial justification and supplement the record." The judge reaffirmed his September 8 Order, including his findings of no substantial justification for the General Counsel's settlement posture and appeal of the judge's 1997 decision. The judge partially granted the application and awarded the Applicant the amount of $30,909.12, plus any additional allowable fees and expenses that might be incurred in future litigation of this EAJA case. The judge also indicated that he would have reached the same result even if he had considered the General Counsel's answer in full.

The General Counsel excepts to the judge's procedural ruling to strike portions of the October 8 answer and to the judge's findings of no substantial justification, which were initially set forth in the September 8 Order and reaffirmed in the judge's supplemental decision. We find merit in these exceptions and, for the reasons stated below, reverse the judge's procedural ruling, consider the answer in full, find substantial justification in favor of the General Counsel, and deny the application in toto.

B. Procedural Issue

The judge ruled that the General Counsel was precluded from "relitigat[ing] the issue of substantial justification in an answer where the General Counsel ha[d] already chosen to litigate that issue by filing a motion to dismiss." According to the judge, the June 30 motion to dismiss and the October 8 answer constituted "two bites at the apple" on the substantial justification issue. The judge believed that the substantial justification arguments set forth in the answer could only be considered if based on newly discovered or previously unavailable matters. The General Counsel excepts to the judge's ruling and argues that the October 8 answer satisfies the provisions of Section 102.150 of the Board's Rules and Regulations. We find merit in this exception.

Section 102.150(a) of the Board's Rules requires specific time periods for the filing of an answer in an EAJA case. This Rule provides, in pertinent part:

[1] As part of his supplemental decision, the judge incorporated his findings and conclusions set forth in his prior September 8 Order in this case, which we discuss more fully infra.

[2] All dates are in 1998 unless otherwise indicated.

[3] 325 NLRB 762.

> (a) Within 35 days after service of an application the General Counsel may file an answer to the application. Unless the General Counsel requests an extension . . . under paragraph (b) of this section, failure to file a timely answer may be treated as a consent to the award requested. The filing of a motion to dismiss the application shall stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. . . . Review of an order granting a motion to dismiss an application in its entirety may be obtained by filing a request therefor with the Board in Washington, D.C., pursuant to section 102.27 of these rules.

Under the Board's Rule, the General Counsel normally has 35 days in which to file an answer to the application unless he decides to file a motion to dismiss the application. In that situation, the rule permits the filing of a motion to dismiss the application to extend the normal 35-day filing requirement for an answer to an additional "35 days after issuance of any order denying the motion." In other words, if the General Counsel does not prevail on his motion to dismiss and desires to continue to contest the issuance of an EAJA award, Section 102.150(a) not only permits, but specifically requires, the General Counsel to file an answer to preserve his challenges to the application.[4] Otherwise, Section 102.150(a) reveals that failure to file a timely answer may be treated as the General Counsel's consent to the award requested by the EAJA applicant.

Section 102.150(c) of the Board's Rules identifies the parameters and scope of an answer in an EAJA case. The Board's Rule states:

> (c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the General Counsel's position. If the answer is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits shall be provided or a request made for further proceedings under section 102.152.

Section 102.150(c) broadly permits the delineation of "any objections to the award" in the answer, and this Rule contains no explicit or implicit prohibition against the inclusion or restatement of any issues or arguments that may have been presented in any prior pleading by the General Counsel, including a motion to dismiss the EAJA application. Specifically, this Rule does not restrict or limit the General Counsel's arguments that are presented in an answer to "newly discovered" or "previously unavailable" matters, as the judge found. Thus, Section 102.150(c) places none of the restrictions on the October 8 answer imposed by the judge in the instant case.

We find that the General Counsel complied with the provisions of Section 102.152(a). The General Counsel chose to file a timely motion to dismiss the application. Then, the judge in his September 8 Order partially denied that motion on the substantial justification issue. That partial denial, however, activated the additional 35-day provision extending the period for the filing of a timely answer under Section 102.150(a). Thus, when the General Counsel submitted his answer on October 8, the 30th day after the issuance of the judge's September 8 Order, he met the time requirements specified by Section 102.150(a).

We also find that the October 8 answer satisfies the requirements of Section 102.150(c). The answer delineates the General Counsel's objections to the award requested by the Applicant, identifies pertinent facts in support of the General Counsel's position, and includes supporting affidavits and documents.[5] Therefore, we find that the judge should not have struck those portions of the General Counsel's answer pertaining to the substantial justification issue.

C. Substantial Justification Issue

EAJA, as applied through Section 102.143(b) of the Board's Rules, provides that a "respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding" and who meets certain eligibility requirements relating to net worth, corporate organization, number of employees, etc., is eligible to seek reimbursement for certain expenses incurred in connection with that proceeding.[6] Section 102.144 of the Board's Rules states that reimbursement of such expenses will be awarded "unless the position of the General Counsel over which the party prevailed was substantially justified." To meet this burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint, taking the matter through hearing, and in filing exceptions

[4] If the General Counsel prevails on his motion to dismiss the application, the filing of an answer is not necessary. Under Sec. 102.150(a) of the Board's Rules, the application is dismissed unless the Applicant decides to seek Board review of the judge's dismissal of the application. Pursuant to Sec. 102.27 of the Board's Rules, the Applicant may file a request for review within 28 days from the date of the judge's Order of dismissal of the application.

[5] As here, in *Shell Ray Mining*, 297 NLRB 53, 55–56 (1989), the General Counsel raised the substantial justification argument initially in his motion to dismiss the EAJA application and later in his answer to the application.

[6] There is no dispute that the Applicant meets these threshold eligibility requirements.

to the judge's decision. An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden.

In *Galloway School Lines*, 315 NLRB 473 (1994), the Board summarized the following principles relating to the substantial justification test:

> In order to determine whether the General Counsel has satisfied this test, it is necessary first to identify what constitutes substantial justification. The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and that it is not intended to deter the agency from bringing forward close questions or new theories of law. The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply.

Id. at 473 (footnotes omitted). Accord: *Inter-Neighborhood Housing Corp.*, 321 NLRB 419 (1996), enf. denied 124 F.3d 115 (2d Cir. 1997).

Weighing the circumstances of the underlying unfair labor practice case, the judge found that the General Counsel was substantially justified in issuing and prosecuting the complaint through the hearing stage and the posthearing briefing period preceding the judge's decision.[7] However, the judge found that the General Counsel's settlement posture through the conclusion of the hearing and the General Counsel's appeal of the judge's 1997 decision did not satisfy the substantial justification test. We disagree.

D. Settlement Posture

In late 1995, the International Association of Machinists and Aerospace Workers, AFL–CIO petitioned to represent the Applicant's production and maintenance employees. Brian Freid, an employee working in the Applicant's CNC department, campaigned for the Union. Two weeks after the Board conducted an election on the Union's representation petition, the Applicant discharged Freid on February 2, 1996.[8] On July 29, 1996, Freid filed a timely unfair labor practice charge alleging that his discharge had violated Section 8(a)(3) and (1) of the Act.[9] The Applicant denied that Freid's discharge had violated the Act in any manner. After conducting an investigation of Freid's discharge, the Regional Director on behalf of the General Counsel issued a complaint, on January 31, 1997, alleging that Freid had been unlawfully fired for engaging in union activities.

The Regional Director's precomplaint investigation revealed the following information. On the day of his discharge, Freid had been working on the T-7 machine in his department. Shortly before his work shift was scheduled to end that day, Freid was notified that he was discharged. After Freid's discharge, the T-7 machine "crashed" when an employee attempted to operate it. The crash caused damage and the machine was unusable for at least 1 day.

The Regional Director obtained conflicting evidence about this T-7 machine crash, including sworn affidavits from Union Representatives Joe Cooper and Don Stella and employees Tom Austin, Wayne Weichinger,[10] and Freid. Cooper[11] and Stella[12] attributed responsibility for this machine crash to Freid. Freid,[13] Austin,[14] and Weichinger[15] gave assurances that Freid was not involved in

[7] There are no exceptions to the judge's finding. We do not construe as properly filed exceptions certain statements in the Applicant's brief that arguably challenge the judge's finding.

[8] After Freid was discharged, the Applicant withdrew its objections to the election won by the Union, recognized the Union, and negotiated a contract with the Union.

[9] Shortly after Freid's discharge, the Union filed, but later withdrew, an unfair labor practice charge against the Applicant relating to the discharge.

[10] In sec. D, par. 6 of his September 8 Order, the judge mistakenly refers to "Weichinger" as "Hechinger."

[11] Cooper recounted his conversation with Freid during a meeting at the union hall to discuss then-pending issues relating to the January 1997 Board election. When their conversation turned to a discussion of Freid's discharge, Cooper tried to persuade Freid to accept a cash settlement offered by the Applicant in February 1996. Cooper also told Freid that the Applicant believed that Freid had sabotaged company equipment. According to Cooper, Freid denied that he sabotaged the T-7 machine, but later he admitted to Cooper that he "had someone else do it."

[12] Regarding Cooper's questioning Freid about sabotaging company equipment, Stella claimed that he was there at the meeting when Freid admitted his involvement.

[13] Freid denied that he ever sabotaged any company equipment or ever counseled employees to sabotage company equipment. Freid also did not recall telling Cooper at any time that he had someone else sabotage the T-7 machine.

[14] Austin, a former employee, stated that he did not believe that Freid would sabotage company equipment. He recalled that the T-7 machine crashed on two other occasions after Freid's discharge.

[15] Weichinger, a current employee, stated that, by accident, he had incorrectly programmed the T-7 machine after Freid left the plant on February 2, 1997. Weichinger thought that he may have caused the T-7 machine crash. Weichinger confirmed that Freid had never asked him to sabotage a company machine. Weichinger stated that he did not believe that Freid would sabotage a company machine. Weichinger also recalled that he and Tim Piehl, another union representative, had a telephone conversation about Freid's situation. According to Weichinger, Piehl was upset because Freid wanted to settle his discharge claim to include reinstatement and because Weichinger was not willing to say that Freid was responsible for the T-7 machine crash.

sabotaging company equipment, including the T-7 machine.

After the issuance of the complaint alleging Freid's discharge to be unlawful, the Regional Director, on behalf of the General Counsel, engaged in settlement discussions with the Applicant. By letter dated February 7, 1997, the Regional Director proposed, inter alia, job reinstatement and backpay for Freid, but he indicated a willingness to entertain other settlement possibilities with the Applicant. By letter dated February 19, 1997, the Applicant stated that it had explored some settlement proposals with the Region, and it was opposed to a settlement "along the lines of 100% relief" for Freid. The Applicant suggested, without delineating the specifics, that it would entertain any "reasonable" settlement proposals from the Region. The parties were unable to reach a settlement. The case proceeded to trial in May 1997, and the judge subsequently recommended dismissal of the complaint in his 1997 decision.

At the trial, Cooper, Freid, and Weichinger provided testimony about the T-7 machine crash immediately after Freid's discharge, which was consistent with the statements in their precomplaint affidavits to the Regional Director. In his 1997 decision, the judge found, inter alia, that Freid had counseled another employee to damage the machine and Freid told Cooper that he had done so. The judge's findings were based on his crediting of Cooper's trial testimony and his discrediting of Freid's and Weichinger's trial testimony. The judge emphasized "Cooper's convincing demeanor," and found "no reason to disbelieve Cooper's testimony."[16] The judge also found it "highly unlikely that Cooper, a union agent, would simply fabricate testimony of this nature."[17] The judge rejected Weichinger's testimony based on demeanor grounds and as being evasive and inconsistent with the inherent probabilities of the situation, noting that Weichinger had a telephone conversation with Freid after his discharge and the T-7 machine was not a part of Weichinger's normal routine. Thus, in light of his credibility findings, the judge found that, even if Freid had been unlawfully discharged, he was not entitled to reinstatement because of his involvement in the T-7 machine crash. In his exceptions to the judge's 1997 decision, the General Counsel did not challenge the judge's denial of reinstatement for Freid. In his brief supporting his exceptions to the judge's 1997 decision, the General Counsel no longer sought a reinstatement remedy for Freid's discharge.

In his September 8 Order, the judge acknowledged that credibility issues existed in the underlying unfair labor practice case, and that the General Counsel has leeway in litigating cases that turn on the resolution of the credibility of witnesses. However, the judge concluded that the General Counsel should have administratively discredited Freid's and Weichinger's "inherently unreliable" testimony about the T-7 machine crash. The judge believed that had Freid's and Weichinger's testimony been properly disregarded the General Counsel would have been without any basis to seek Freid's reinstatement. Thus, the judge found that the General Counsel's pursuit of a reinstatement remedy for Freid, during settlement discussions with the Applicant, was not substantially justified. Contrary to the judge, we find that it was not unreasonable for the General Counsel to rely on the sworn affidavits of Freid and Weichinger for settlement purposes.

Weichinger gave several statements adverse to his own interests as a current employee of the Applicant.[18] His admission that he may have been the one to have caused the T-7 machine to crash after Freid's discharge was given at considerable risk of economic reprisal, including loss of employment. In addition, former employee Tom Austin supported Weichinger's version of the events insofar as Austin stated that he believed that Freid would not sabotage company equipment. Weichinger's statements corroborated Freid's own specific denial of any involvement in the sabotage of company equipment, including the T-7 machine. Thus, under these circumstances, the General Counsel was not obligated to completely discount their sworn affidavits.

The judge also failed to allow for the possibility that Cooper and Stella may have had a motive to act contrary to Freid's individual interests. Weichinger recalled that the Union had tried to persuade him to blame Freid for the T-7 machine crash at a time when the Union was apparently pressuring Freid to take the February 1996 cash settlement offer from the Applicant. Weichinger indicated that the Union was upset apparently because Weichinger and Freid were not going along with how the Union wanted to dispose of Freid's union discrimination claim. The General Counsel believed that a possible plausible explanation for this response by the Union was its competing institutional interest in negotiating a collective-bargaining agreement on behalf of the remaining unit employees of the Applicant. Thus, it is possible that the union affidavits might have been substantially influenced or compromised by the Union's frustrations over Freid's continued pursuit of his discrimination claim in a manner not endorsed by the Union.

[16] 325 NLRB at 771.

[17] Id.

[18] See *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1977) (judge credited current employee who testified contrary to the company's position).

We find that the issues involving Freid's involvement or responsibility for the T-7 machine crash turned on credibility of the witnesses. Prior to the issuance of the complaint, the Regional Director conducted a reasonable investigation and attempted to resolve the conflict between Freid's and the Union's version of events. Freid's sworn statements of denial were corroborated by sworn affidavits from Weichinger and Austin, and union representatives' sworn affidavits to the contrary were not free of doubt and suspicion. In these circumstances, we find that under the EAJA's standard of "substantial justification" the General Counsel could pursue a reinstatement remedy for Freid in settlement discussions that occurred prior to the issuance of the judge's 1997 decision.

E. The General Counsel's Exceptions to the Judge's 1997 Decision

In the underlying unfair labor practice proceedings, the General Counsel relied on the Board's *Wright Line*[19] test to establish the illegality of Freid's discharge. Throughout these proceedings, the Applicant maintained that on February 2 the company president gave Freid three reasons for firing him—declining production in the CNC department, Freid's poor attendance, and deteriorating communication between Freid and his supervisor. The General Counsel argued that these reasons were pretextual, and therefore that the presence of an unlawful motive could be inferred. The judge assumed that these reasons were pretextual, but he declined to infer an unlawful motive for Freid's discharge. Instead, the judge credited the Applicant's attorney who testified that the company president had suspected Freid of deliberately impairing production in the CNC department before his discharge. Although the Applicant had never asserted this suspicion as a basis for discharging Freid, the judge dismissed the complaint.

In his exceptions to the judge's 1997 decision, the General Counsel argued for reversal of the judge's dismissal of the complaint. The General Counsel excepted to some of the judge's credibility resolutions, and he attacked, inter alia, the judge's finding that Freid was terminated for a reason that was neither communicated to him when he was fired nor relied on by the Applicant during the hearing. The General Counsel also argued that Freid's discharge should be overturned because the Applicant did not have a good-faith belief that Freid engaged in any deliberate impairment of production in the CNC department.

In his September 8 Order, the judge found that the Applicant was entitled to an EAJA award because the General Counsel was not substantially justified in filing exceptions to the 1997 judge's decision. He read the General Counsel's exceptions as challenging only his credibility resolutions. We disagree and observe that the General Counsel's exceptions were based on more than a dispute over the judge's credibility resolutions. We find that "[e]ven accepting the judge's credibility resolutions, the General Counsel reasonably argued that the judge should have drawn other inferences from the record that would have supported the General Counsel's position." *Europlast, Ltd.*, 311 NLRB 1089 (1993), affd. 33 F.3d 16 (7th Cir. 1994).

The record in the underlying unfair labor practice case showed that Freid had been notified of three reasons for his discharge, while the Applicant's attorney testified to a previously undisclosed "fourth" reason that the judge found justified Freid's discharge. In light of what appeared to be a shifting of defenses by the Applicant, the General Counsel wanted the Board to examine the judge's conclusion that the General Counsel failed to establish a prima facie case of discrimination. It is well established that shifting of defenses weakens the employer's case, because it raises the inference that the employer is "grasping for reasons" to justify an unlawful discharge.[20] On review, the Board did not infer unlawful motivation, as requested by the General Counsel, because the Board relied on the testimony of the Respondent's president that corroborated the testimony of the Applicant's attorney about the "fourth" discharge reason.[21]

Faced with a similar situation in *Europlast*, supra at 1089, where it denied the EAJA application, the Board stated:

> Because it was possible to draw a set of inferences from the circumstances here that would have supported the General Counsel's position, we find that the General Counsel's arguments had a reasonable basis in law and fact and were therefore substantially justified

[19] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As the Board explained in *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999) (footnotes omitted):

> Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged the . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

[20] *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

[21] 325 NLRB at 762 fn. 2.

within the meaning of the Equal Access to Justice Act. See *Bennington Iron Works*, 278 NLRB 1087, 1088 (1986). That the arguments ultimately proved to be unpersuasive is insufficient to sustain the application because they were not insubstantial. *Lion Uniform*, 285 NLRB 249, 258 (1987).

Accordingly, we reverse the judge's finding of no substantial justification for the General Counsel's filing of his exceptions to the judge's 1997 decision.

ORDER

The National Labor Relations Board reverses the recommended Order of the administrative law judge and orders that the application of the Applicant, Meaden Screw Products, Co., Burr Ridge, Illinois, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

SUPPLEMENTAL DECISION AND ORDER

WILLIAM G. KOCOL, Administrative Law Judge. On May 15, 1998, the National Labor Relations Board issued a Decision and Order in this case.[1] Thereafter, on June 2, 1998, Respondent filed an application for fees and expenses under the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations, and a motion to withhold confidential financial information from public disclosure. That same day the Board referred those matters to me for appropriate action. On June 5, 1998, Respondent filed a petition to increase maximum attorney fee rates. On June 30, 1998, the General Counsel filed a motion to dismiss respondent's application and alternative motion to strike portions of the application. On July 10, 1998, Respondent filed a reply brief in support of the application. On August 3, 1998, Respondent filed a revised itemization of EAJA recovery sought. Treating this as a motion to amend the application, on August 6, 1998, I issued an Order granting Respondent's request to amend the application. On August 14, 1998, the General Counsel filed a response to Respondent's revised itemization.

Discussion

On the entire record in this case, and after considering the arguments made by the General Counsel and Respondent, I make the following findings of fact. On September 8, 1998, I issued an Order, which I adopt as part of this decision. In that Order I resolved the issues raised by the General Counsel's motion to dismiss. I concluded that the General Counsel was substantially justified in some respects but was not substantially justified in other respects. I further concluded that Respondent was not entitled to the full amount of fees that it had requested. Thereafter, pursuant to my request Respondent filed a revised schedule of fees and expenses that was consistent with the Order. That revised schedule is also made part of this decision. Although the General Counsel was given 10 days to file any objections to the revised schedule, it did not file any objections. I therefore conclude that the amount of fees and expenses set forth in the revised schedule, in the amount of $30,909.12, is consistent with the Order.

On October 8, 1998, the General Counsel filed an answer. The answer admitted that Respondent meets the eligibility requirements under EAJA. The answer also pled a number of affirmative defenses. The answer then goes on to attempt to relitigate the issue of whether the General Counsel was substantially justified. On October 30, 1998, Respondent filed a reply to the General Counsel's answer

I conclude that the General Counsel may not relitigate the issue of substantial justification in an answer where the General Counsel has already chosen to litigate that issue by filing a motion to dismiss. As indicated, the General Counsel raised the issue of his substantial justification in the motion to dismiss. The General Counsel had a full opportunity to make a complete record in that regard and present whatever arguments he thought appropriate. I then resolved those issues. The General Counsel now attempts to supplement the record and make additional arguments on that issue.[2] I conclude that the General Counsel may not now do so; the General Counsel is not entitled to two bites at the apple. The Board has consistently held that the General Counsel is not a preferred party in Board proceedings. No party is entitled to raise an issue and then, after the issue is decided and it has the benefit of the judge's ruling, supplement the record and make additional arguments on the issue that has already been decided.[3] Common notions of fairness and efficiency require that this not be allowed. Moreover, such a procedure would render any ruling on the merits of a motion to dismiss meaningless, since such a ruling would not be a final disposition of the issues raised. Accordingly, I shall strike from the General Counsel's answer those portions that seek to relitigate the issue of substantial justification and supplement the record.[4]

CONCLUSIONS OF LAW

1. Respondent is eligible to receive fees and expenses under EAJA and the Board's Rules.

[1] 325 NLRB 762.

[2] I have examined the answer and have determined that it does not contain newly discovered or previously unavailable matters. Further, in the event that the full answer was to be considered, I conclude that it would not change the results set forth in the Order.

[3] For example, had I granted the motion to dismiss, Respondent would be entitled to appeal that ruling to the Board. It could not, however, then add to the record and make additional arguments based thereon.

[4] The General Counsel's processing of this case continues to be troubling. As is now apparent, there was no dispute concerning Respondent's eligibility and there were no credibility matters warranting a hearing in this case. The only issues were whether the General Counsel was substantially justified and the amount of money Respondent was entitled to. Both of these issues were resolved in the Order. Months ago I suggested to the parties that, under these circumstances, my ruling on the General Counsel's motion to dismiss would resolve all issues and make this case ready for final disposition. The General Counsel, however, insisted on filing an answer that we now see contained nothing that could not have been submitted months ago. This posture delayed the final disposition of the case and caused unnecessary expense.

2. Respondent is a prevailing party as defined in EAJA and the Board's Rules.

3. The General Counsel was substantially justified in issuing complaint alleging Freid's unlawful discharged.

4. The General Counsel was not substantially justified in filing exceptions to my earlier decision in this case.

5. The General Counsel's settlement posture in this case was not substantially justified.

6. The General Counsel's motion to strike attorney's fees charged in excess of $125 per hour is granted.

7. The General Counsel's motion to strike fees and expenses associated with the settlement efforts in this case is denied.

8. The General Counsel's motion to strike $1200 in fees and expenses associated with the brief that Respondent prepared but that was rejected by the Board is granted.

[Recommended Order omitted from publication.]